LEGAL PRIVILEGE AND KEEPING SECRETS

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It's hard—but not impossible—to keep secrets in a lawsuit.

In arbitration, at pre-trial questioning or during trial, a witness cannot usually refuse to answer an otherwise relevant and material question just because the information is sensitive or confidential. Private conversations, internal records or even business secrets must be disclosed if they are asked about and significantly help determine the issues. Similarly, personal information, intimate details, and even embarrassing or incriminating facts cannot be hidden if they are relevant. Yes, there are safeguards to prevent such confidential information from being used outside of that particular legal proceeding. But if something is relevant and material to the issues at hand, it must be disclosed or produced within the litigation.

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However, there are exceptions, such as legal privilege, which refers to a special right, advantage or immunity. It is the right of someone involved in a legal proceeding to withhold confidential information because of its legal character.

The first and most fundamental form of legal privilege protects the communication between someone and his or her lawyer. What we tell our own lawyers and what they tell us is privileged. Full stop. End of discussion. No one—not the police, not the government, not even the courts—can compel lawyers and their clients to reveal what they have shared with each other.

For example, take a construction dispute over bad workmanship. Regardless of whether we are suing or being sued, we are entitled to honest, unflinching, even blunt legal advice. We need to know where we stand, and when to fight and when to settle. And so the law protects those candid conversations shared with our own lawyers that explain the good, bad and most importantly, downright awful evidence relating to the dispute. The law zealously guards the advice given to us by our lawyers.

Another form of privilege attaches to the information gathered because of litigation, whether or not lawyers are involved. Suppose we realize that there is enough hissing and spitting about the workmanship on a job to suggest that litigation is likely. We have not yet called in the lawyers, but we are worried about litigation and begin to dig into events. We gather information and prepare a record of the dirt found. If litigation is the dominant purpose of our investigation, then the law protects that information. It is privileged and need not be disclosed—at least within that litigation. (Conversely, if the reason is to thwart a warranty claim or deep-six a change order request, then the information may not be privileged.)

A third form of privilege attaches to communications between litigants trying to settle a dispute. The law calls this "without prejudice" communication, and it is meant to encourage settlement. The idea is that the parties should enjoy a cone of silence within which they can candidly confront issues and offer compromises without those admissions coming back to bite them. The law protects a contractor who offers to cut his bill to close out the job and settle the dispute. Similarly, the owner's counteroffer to eat some of his alleged losses cannot be disclosed if the dispute trudges on.

When negotiating a resolution, it doesn't matter how the parties label their communications (despite the common practice of insurance adjusters and surety representatives who paste "without prejudice" on everything). The important point is that they're trying to settle. If so, what they say to each other is privileged.

Legal privilege protects some secrets. But as with all privileges, earning that protection depends on the facts.